Testimony of Bradley C. Lambert, Deputy Director, Virginia Department of Mines, Minerals and Energy on behalf of the Interstate Mining Compact Commission and the National Association of Abandoned Mine Land Programs re Oversight Hearing on the Secretary of Interior's Order No. 3315 to Consolidate and Establish the Office of Surface Mining Reclamation and Enforcement within the Bureau of Land Management – November 17, 2011

Good morning. My name is Butch Lambert and I serve as Deputy Director of the Virginia Department of Mine, Minerals and Energy. I am appearing today on behalf of the Interstate Mining Compact Commission (IMCC) and the National Association of Abandoned Mine Land Programs (NAAMLP).

The Interstate Mining Compact Commission (IMCC) is an organization of 24 states located throughout the country that together produce some 95% of the Nation's coal, as well as important hardrock and other noncoal minerals. Each IMCC member state has active mining operations as well as numerous abandoned mine lands within its borders and is responsible for regulating those operations and addressing mining-related environmental issues, including the reclamation of abandoned mines.

The NAAMLP is a tax-exempt organization consisting of 30 states and Indian tribes with a history of coal mining and coal mine related hazards. These states and tribes are responsible for 99.5% of the Nation's coal production. All of the states and tribes within the NAAMLP administer abandoned mine land (AML) reclamation programs funded and overseen by the Office of Surface Mining (OSM) pursuant to Title IV of the Surface Mining Control and Reclamation Act (SMCRA, P.L. 95-87).

IMCC and NAAMLP member states represent a cross section of the country and many implement regulatory programs under SMCRA and work closely and cooperatively with the federal government under the Federal Land Policy and Management Act (FLPMA). As such we are intimately familiar with and generally work in partnership with the Office of Surface Mining Reclamation and Enforcement (OSM) and the Bureau of Land Management (BLM). We therefore appreciate the opportunity to weigh in on the consolidation of these two federal agencies and the potential impacts that this action will have for state governments.

As you know, Mr. Chairman, the states play a central role in the implementation and administration of SMCRA. Congress specifically provided for a "primacy" approach under the law, whereby states were to be the front line, exclusive regulatory authorities upon approval of a regulatory program by OSM. To date, 24 states have received primacy under SMCRA and continue to operate first-class regulatory programs that protect the public and the environment from the impacts of coal mining operations. The states also implement programs for the reclamation of lands impacted by pre-1977 mining operations that were abandoned or inadequately reclaimed.

OSM was established as an independent federal agency charged with implementing and administering several distinct responsibilities under SMCRA, as

specifically delineated in Section 201 of the Act. Among those are reviewing and approving or disapproving state programs and assisting the states in the development of those programs. Section 705 also authorizes OSM to make annual grants to states for the purpose of administering and enforcing state programs and to cooperate with and provide assistance to states for the purpose of assisting them in the development, administration and enforcement of their programs, including technical assistance and training. Significantly, for purposes of this hearing, Section 201 (b) of SMCRA provides that no legal authority, program or function in any federal agency which has as its purpose promoting the development or use of coal or other mineral resources or regulating the health and safety of miners shall be transferred to OSM.

Secretarial Order No. 3315, issued on October 26 and which is the subject of this hearing, would consolidate the OSM within the BLM in an effort to "integrate the management, oversight, and accountability of activities associated with mining regulation and abandoned mine land reclamation, ensure efficiencies in revenue collection and enforcement responsibilities, and provide independent safety and environmental oversight of these activities." Clearly, by its own terms, this secretarial order will have significant implications for state governments who implement regulatory programs under SMCRA. Given that the states were never informed, much less consulted, about this "consolidation", the Secretary's order raises more questions than it answers for us. Among them are the following:

- Why were the states not consulted about this matter since they are the primary stakeholders under the various organic laws affected by this consolidation? How and when does Interior plan to consult with the states and tribes to receive their input on the consolidation and what it may mean for state/federal interaction under both SMCRA and the federal land management laws?
- How will the consolidation impact the role of the states under SMCRA, especially in terms of funding for state Title V (regulatory grants) and Title IV (AML grants)? How will it specifically impact the administration of the AML program under Title IV of SMCRA? Does it reflect a further attempt to accomplish by Secretarial order what the President has proposed for the AML program as part of his deficit reduction plan?
- How will the consolidation affect the current chain of command within the Interior Department, especially with regard to federal oversight of state programs? How could this consolidation impact the cooperative working relationship that has generally attended the implementation of SMCRA and FLPMA? Who will have primary lead responsibility for the new organization – BLM or OSM? How can a "consolidation" result in the continued viability of two separate agencies, as suggested by some of the press materials distributed by Interior?
- How does Interior intend to reconcile the differing missions of BLM and OSM under the various organic laws affected by the consolidation?
- How will this consolidation save money and achieve governmental efficiency, other than the potential for combining some administration functions? Will the combination of other functions (inspection, enforcement, oversight) actually result

in the expenditure of more money, especially if the federal government assumes responsibilities that were formally entrusted to the states?

- Does Interior anticipate that changes will be needed to the organic acts affected by the consolidation?
- What is the legal basis for the consolidation? Has the Solicitor's Office rendered an opinion on the matter?
- BLM's primary mandate for its entire existence has been on the management of public lands in western states. How can the agency effectively shift to managing mining operations on state and private lands in the central and eastern portions of the country? How will this save money?

Without answers to these most basic of questions, the states are at a significant disadvantage in commenting on the consolidation. We hope in the near future to receive answers to these questions and thereafter to provide more detailed, specific input. We have been told that the states will be consulted some time after December 1 (the effective date of the Secretarial Order). However, given recent Departmental decisions on other mining-related issues, we have serious concerns about the motivations behind this consolidation. Beginning with the signing of the June 2009 Memorandum of Understanding between the Department, the Environmental Protection Agency and the U.S. Army Corps of Engineers regarding Appalachian surface coal mining operations and extending to the recent budget and deficit reduction proposals to completely reform the AML program, the states have been unable to ascertain the reason and basis for Departmental actions that directly impact the state/federal relationship under SMCRA. On several occasions we have requested opportunities to discuss the motivation behind these critical decisions and actions so that we can better respond to the policies and rules that have grown out of the MOU – especially the significant revisions to federal oversight of state programs under SMCRA and OSM's anticipated proposed rule on stream protection. At every turn, we have been ignored and our input has been restricted to the formal commenting process that attends the actions.

Our desire as state partners with OSM and BLM is to work cooperatively with these agencies, as we have on many occasions in the past, to accomplish our respective roles and responsibilities under national environmental and land management laws. However, if we are cut out of the process from the very outset, it is difficult to fully engage – especially once decisions, like the consolidation, are a fete accompli. We are at a loss to understand why the Department, and OSM in particular, is loathe to bring the states into the early decision-making process on initiatives that directly impact the state/federal partnership. We are not just another set of stakeholders under laws like SMCRA – we are the primary regulatory authorities. Without us, the laws do not work. We have proven time and again that when we work cooperatively together as partners, we can accomplish much – and do so effectively and efficiently.

The consolidation is particularly troublesome in terms of what it may mean for the operation of several key provisions under SMCRA, including inspection, enforcement, and the AML program. BLM is not solely a regulatory agency, like OSM. Even if OSM continues in some sort of independent role (yet to be articulated), we are

uncertain what the lines of authority will be – especially in the field. The states have enjoyed and benefited from a fairly good working relationship with OSM regional and field offices and we are hopeful this can be maintained. Given the complexities associated with the regulation of active mining operations, especially in various geographical regions across the country, a comprehensive understanding of state programs and the nuances of each is critical. In some respects, it has taken the better part of 30 years to achieve the working relationship we currently have with OSM field and regional offices. BLM is not likely to possess this level of experience or expertise.

With regard to the AML program, we are even more circumspect about the potential impacts from the consolidation. Already, this program has been under attack by the Administration, as evidenced by the recent deficit reduction proposal and the FY 2012 proposed budget. I would like to submit for the record a copy of a letter that IMCC and the AML Association recently sent to the Supercommittee regarding the implications of this proposal for state AML programs. We are concerned that this consolidation would be a further attempt to implement all or part of this proposal under the banner of "government efficiency". As we note in our letter, the changes to the AML program being proposed by the Administration amount to a wholesale revision of Title IV of SMCRA and those decisions are best made by your Committee and others in Congress.

We are concerned that the consolidation could also serve as a mechanism for diluting the AML program under SMCRA, including a diversion of funding from the Trust Fund for other priorities. Even though this appears to be precluded by the language of SMCRA, there are ways in which funding can be diverted along the way, or lost due to additional bureaucratic complexities that do not exist at the present time. While BLM has administered a limited hardrock AML program, which in many ways has been dependent on the states for its effectiveness, the size and complexity of the AML program under SMCRA dwarfs the BLM program. Bringing it under the BLM banner, even for administrative efficiencies, could undermine the overall quality of the program. Again, we need to know more about what the Department has in mind with respect to how this program would be incorporated into the BLM before we can comment on the specifics. There is the potential for combining and administering the two programs in a way that would preserve the coal AML program under SMCRA while enhancing BLM's hardrock AML program, both in the way of administrative efficiencies and funding allocations. But this will take considerable planning and discussion and hence the need for expanded consultation with the states and tribes.

An area of particular concern under the consolidation is the impact it would have on training and technical assistance. This is one of OSM's key responsibilities under SMCRA and it has paid significant dividends over the years in terms of support for the states and tribes. Given the increasing number of retirements at both the state and federal levels and the need to train new employees who may have limited knowledge of SMCRA and its regulatory framework, the OSM training program is a critical link to effective regulation. And as we move into more complex technical issues surrounding the implementation of SMCRA, the assistance OSM provides to the states, particularly through its Technical Innovation and Professional Services (TIPS) program, is also of

great importance. We would not want to see any of these program activities eliminated or unduly constrained under the consolidation.

One of the hallmarks of both SMCRA and FLPMA over the years has been the ability of the states and the federal government to work well together, especially at the field/state and regional levels. We are hopeful that this can continue and that as we learn more about the details of the consolidation, we can work jointly to ascertain where program and administrative efficiencies can be gained without undermining the separate and distinct statutory responsibilities under these two laws. We doubt that this can be accomplished without maintaining an independent role for OSM that preserves the congressionally mandated relationship between OSM and the states. Given our experience with past reorganizations that have led to some Interior agencies being completely subsumed by others, as occurred with the U.S. Bureau of Mines, we have serious reservations about the current process. As a result, we encourage your close oversight of this reorganization to insure that the purposes, objectives and mandates of SMCRA and FLPMA are not lost in the shuffle.

One of the stated goals of the consolidation is to save money for the American taxpayer through administrative and programmatic efficiencies. We see this as a worthy goal, and one that the states not only share, but have consistently worked toward in the context of their own program operations. This is one of the reasons that we have opposed a recent revision to OSM's directive regarding the use of Ten-Day Notices (TDNs) in primacy states. Directive INE-35 authorizes the use of TDNs to communicate alleged defects in state-issued permits, contrary to the intent of SMCRA. Each time OSM utilizes a TDN in this fashion to second-guess a state permitting decision, it results in the considerable expenditure of state resources to respond to the TDN (as well as federal resources to review the state response). Given that states already have formal mechanisms in place for the appeal of their permitting decisions by state courts and administrative bodies, this federal process results in a duplicative, wasteful expenditure of valuable state and federal resources.

OSM's oversight directive (REG-8) also results in a duplication of effort by requiring independent inspections of surface coal mining operations in primacy states, rather than engaging in joint inspections with the states. OSM has recently re-assigned at least 18 FTEs to this effort, resulting in unnecessary expense with little to show in the way of programmatic benefit. The House Interior Appropriations Subcommittee, in its report on the FY 2012 budget proposal, recently chastised OSM for this wasteful spending, noting that: "The Committee also rejects the proposal to increase inspections and enhanced Federal oversight of State regulatory programs. Delegation of the authority to the States is the cornerstone of the surface mining regulatory program. The Committee believes the President's proposal to increase Federal inspections would not only be a redundant activity, but also duplicative and wasteful spending. The State regulatory programs do not need enhanced Federal oversight to ensure continued implementation of a protective regulatory framework." If Interior is serious about saving money, this would be a good place to start.

Finally, the importance of maintaining OSM as an independent agency cannot be overlooked. At the time that SMCRA was being debated in 1977, Congress was well aware of the importance of maintaining distinct roles and responsibilities among and between agencies that had as their mission the development of mineral resources, as compared to the protection of the public and the environment from mineral development, as well as those who mine those resources. FLPMA, SMCRA and the Mine Safety and Health Act were all passed within about a 12 month period of time by the 94th and 95th Congresses. The framers of these statutes were clearly concerned about the separation of the sometimes competing interests that attended mineral development.

In addressing the creation of OSM under Title II of the Surface Mining Act, the Senate had this to say: "The Office will be separate from any of the Department's existing bureaus or agencies. It is intended that the Office exercise independent and objective judgment in implementing the Act. . . . The Act specifically states that there cannot be transferred to the Office any legal authority which has as its purpose promoting the development or use of coal or other minerals." (S. Report No. 95-128 at pages 63-64). At about this same time, the Senate also reported out the Mine Safety and Health Act and in its report the Senate stated: "The history of the Interior Department's enforcement of [the Coal Act and the Metal Act], either by the Bureau of Mines or by the Mining Enforcement and Safety Administration (MESA), demonstrated a basic conflict in the missions of the Department. In past years, the Department has pursued the goal of maximizing production in the extractive industries, which was not wholly compatible with the need to interrupt production, which is the necessary adjunct of the enforcement scheme under the Metal and Coal Acts. . . . On the other hand, no conflict could exist if the responsibility for enforcing and administering the mine safety and health laws was assigned to the Department of Labor, since that Department has as its sole duty the protection of workers and the insuring of safe and healthful working conditions." (S. Report No. 95-181 at page 5).

The importance of separating out the respective missions, duties and roles of OSM and BLM continues today. From the states' perspective, to ignore the original intent of Congress for establishing these independent agencies would potentially undermine the carefully crafted statutory design and unduly upset the balance of powers and authorities between those agencies. It would also impact the state/federal relationship envisioned by SMCRA. We believe there are ways that Interior can accomplish the administrative efficiencies that it desires without running afoul of the statutory purposes of SMCRA and FLPMA and compromising the roles of OSM, BLM and the states under those statutes. We stand ready to work cooperatively with both OSM and BLM to further discuss the appropriate mechanisms to accomplish this objective.

Thanks again for the opportunity to appear before you today. I would be happy to answer any questions you may have or to provide further information.